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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW KASPER,

Defendant and Appellant.

B207905

(Los Angeles County  
Super. Ct. No. LA055571)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Richard H. Kirschner, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E.  
Winters and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Matthew Kasper timely appealed his conviction on two counts of a three-count indictment. Defendant was convicted on count 2 of attempted second-degree robbery, in violation of Penal Code sections<sup>1</sup> 664/211. Defendant was also convicted on count 3 of assault with a firearm, in violation of section 245, subdivision (a)(2). The court imposed a sentence of 29 years for the attempted robbery, which included enhancements for use of a firearm and for a prior serious felony conviction. The court also imposed a sentence of six years for the assault with a firearm, which it ordered to run concurrently.

Defendant contends that there was insufficient evidence to support a conviction on either count. Defendant further contends that the six-year concurrent sentence imposed for count 3 should be stayed pursuant to section 654. We affirm.

### **FACTUAL BACKGROUND**

On September 11, 2006, Travis Ray called a drug dealer with whom he had dealt before, seeking to purchase some cocaine. The dealer told Ray that either he or another person would call back to work out the details of the meeting. At around 5:00 p.m. a man identifying himself as “Jesse” called Ray and proposed that they meet by a pedestrian tunnel not far from where they were each located.

Ray then proceeded to the tunnel on foot, but found nobody there to meet him. After waiting for about 10 minutes, he returned to his home. While there, Ray received another call from Jesse asking where he was. Ray then returned to the tunnel. As Ray approached, two men near the mouth of the tunnel called out to him. Ray approached the two men. They exchanged greetings and then moved slightly into the tunnel to conduct the transaction in seclusion.

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<sup>1</sup> All statutory references are to the Penal Code.

Once in the tunnel, both men drew guns and demanded that Ray give them “everything you’ve got.” Ray, believing that he would be shot no matter what, tried to push past the two men and run away. As Ray pushed through, he felt a hand begin to pull him down. Ray then heard a gunshot and saw a gun smoking from the corner of his eye. After realizing he was shot, Ray continued running toward the mouth of the tunnel. After exiting the tunnel, Ray dropped to his knees and said, “I’ve been shot.” Ray was eventually aided by people in the vicinity and by the police and paramedics.

The first police officer to arrive on the scene was Officer Duc Dao. Officer Dao interviewed Ray intermittently in the ambulance while en route to the emergency room and also while at the emergency room. Ray described each of the two assailants to Officer Dao. The first was a Black male wielding a revolver. The second was also male, either “White or Hispanic.” This second man had a shaved head with numerous tattoos on his neck and legs. The gun used by the second man was a semiautomatic pistol.

Another officer at the scene was Officer Patrick Cronin. Cronin entered the tunnel after the incident and recovered a 9mm shell casing. Expert analysis of the shell casing determined that it had been fired by a 9mm Luger, which had also been used in a previous shooting.

There were three other witnesses near the tunnel at the time of these events. First, there was Vincent DiGregorio, who lived at the end of the tunnel away from where the shooting took place. DiGregorio was in his house at the time of the incident. DiGregorio noticed a black Pontiac parked on the street near his home and the tunnel. Sometime later, DiGregorio saw two men exit the tunnel and get into the car. At that time, DiGregorio could not clearly distinguish both men, but when the car turned and drove past his home he observed both the driver and the passenger of the car, later describing them both as Black males.

The second witness was Jazmine Alvarez. She was just getting home from the store at the time this incident occurred. As Alvarez was getting out of her car, she looked in the direction of the tunnel and “saw two individuals standing there who were African-American.” Alvarez “didn’t think anything of it.” In her rearview mirror, she saw a

White man walking towards the tunnel. She heard one of the two men near the tunnel call out, ““Over here,”” and the White man on the sidewalk began moving toward the two. Dismissing the activity as just another drug deal, Alvarez took her belongings from her car and began heading up to her apartment. After getting to her apartment door, Alvarez heard two pops, only later realizing they were gunshots. When she looked down from her balcony, Alvarez saw the White man she had seen approaching the tunnel earlier now laid out on the grass.

The third witness is Kimberly Salomon. She was speaking on the phone to the 9-1-1 operator before the police had arrived on the scene. Salomon relayed a description of the perpetrators from another witness to the 9-1-1 operator, describing both as Black males. Salomon did not directly observe the race or ethnicity of either of the men.

Detective Pam Pitcher investigated the crimes. During the course of the investigation, Detective Pitcher prepared a photo array, or “six-pack,” which was to be shown to Ray so that he could attempt an identification of his assailant. A photo of defendant was in the six-pack. However, since Ray had already described his assailant as having tattoos on his neck, Pitcher took the precaution of cropping all the photos from face down to avoid bias. In addition, Pitcher was forced to use an older picture of defendant in the six-pack because in his more recent photos, defendant had a tattoo under his left eye that could not be cropped easily. When Ray observed the six pack, he was unable to make a positive identification, but he did ask Pitcher “if it was a recent photo because he had tattoos . . . at the time.” Ray also said it “seemed like an older picture” to him.

During the trial, Ray identified defendant in court as the second person in the tunnel who had attempted to rob him.

Detective Pitcher also interviewed defendant during the investigation. Defendant told Pitcher that he was in the tunnel when the crime occurred, but he was only a witness to the crime, not the shooter. Defendant also told the detective that he was present at the previous shooting in which the 9mm Luger was used, but again, he said he was merely a witness to the crime.

## **DISCUSSION**

### **I. SUBSTANTIAL EVIDENCE**

Defendant contends that there is insufficient evidence to support a finding that he committed attempted second-degree robbery or assault with a firearm. We disagree.

#### *A. Standard of Review*

Appellant carries a heavy burden to overturn a jury verdict rendered against him based on insufficiency of the evidence: ““The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”” (Citations omitted.) (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Further, our role in reviewing the evidence is quite limited: “Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder.” (Citations omitted.) (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

#### *B. Prosecution’s Evidence*

##### *1. Description and Identification of Defendant by Victim*

The victim’s identification of the defendant as the perpetrator is of great importance in the current case. So long as it is “reasonable, inherently credible, and of solid value” an “[i]dentification of the defendant by a single eyewitness may be sufficient to prove the defendant’s identity as the perpetrator of a crime.” (*People v. Boyer* (2006) 38 Cal.4th 412, 480.)

Here, the victim identified the defendant in court as one of the people who attempted to rob him in the tunnel. The courtroom identification was corroborated by other statements made by the victim both in and out of court. During his testimony and on more than one occasion during the police investigation, the victim described one of his assailants as “White or Hispanic,” a description that is consistent with the defendant, who is white. Also, during his testimony and during the course of the police investigation, the victim described the “White or Hispanic” assailant as having tattoos on his neck and legs. While the victim was not able to describe the tattoos in great detail, still this description is consistent with defendant, who does have tattoos on his neck and legs. The victim also stated that defendant had used a semiautomatic pistol during the attempted robbery and shooting. This evidence alone is substantial enough to allow a reasonable jury to infer that defendant was the person who shot the victim.

## *2. Defendant Present at Two Shootings Involving the Same Gun*

Defendant told the investigating detective that he was in the tunnel at the time the shooting took place, however, he claims that he was not a perpetrator but merely a witness to the crime. Defendant also told the detective that he was a witness to a previous shooting. Analysis of shell casings collected from both crime scenes indicated that all were fired from the same Luger 9mm pistol. Given that it is the duty of the jury to determine the credibility of each witness, and that each fact must be viewed in the light most favorable to the prosecution, it must be presumed that the jury considered defendant’s statements to be one coincidence too many and simply did not believe him.

From these facts, a reasonable chain of inferences connecting the defendant to the present crime can be made. First, the victim identified defendant as his assailant. Second, defendant places himself at the crime scene and also at another shooting. Third, the gun used in both crimes was the same. From these facts, the jury could infer that the victim was testifying truthfully, the defendant was not, and defendant used the same gun on the victim in the tunnel that was used in the previous shooting. These inferences being reasonable, it must be presumed that the jury did make them.

C. Defendant's Claims of Insufficiency of the Evidence

*1. Contradictory Testimony as to the Perpetrator's Ethnicity*

Defendant has challenged the reliability of the victim's identification in several ways. First, defendant points out that the first officer on the scene, who interviewed the victim soon after he was shot, testified that the victim said his assailant was a "male Hispanic," while the defendant is actually a White male. This interview occurred either in the emergency room or in the ambulance on the way to the emergency room, very shortly after the victim was shot. A reasonable jury might well conclude that after suffering a gunshot wound, the failure of the victim to distinguish between a white male and a Hispanic male was not unreasonable. Since such a conclusion is not patently or inherently improbable, it must be presumed that the jury did reach this conclusion.

Next, defendant points to the testimony of three other witnesses who all stated they saw two Black males near the crime scene, which contradicts the victim's account. However, the mere fact that a witness's testimony is contradicted by another does not make the testimony inherently improbable. (*Swafford v. Goodman* (1952) 115 Cal.App.2d 105, 109.) Further, in reviewing the evidence on appeal, "the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be 'substantial,' while a lot of extremely weak evidence might be 'insubstantial.'" (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871-872.)

The present case may be an instance of quantity not equating to quality. Witness DiGregorio testified to seeing, from his home, two Black men enter a car parked near the crime scene and then drive off around the time of the crime. The car was owned by one of defendant's associates. Another witness, Jazmine Alvarez, was in her car when she saw two men "who were African-American" near the tunnel but she "didn't think anything of it." The jury may have determined that neither DiGregorio nor Alvarez were in a position to get a good look at the two men and simply misidentified their ethnicities. It is also possible that the jury did believe DiGregorio saw two Black men but then rejected the inference that these two men must also have been the same ones in the tunnel

when the crime was committed. Neither conclusion being inherently unreasonable, it must be presumed that the jury reached them.

The third witness referred to by defendant is Kimberly Salomon. Salomon told the 9-1-1 operator that both men seen at the tunnel were Black, however she was merely repeating what another eyewitness had told her. When asked if she herself noticed the ethnicity of the assailants, Salomon said that one was Black and the other she could not make out. Given this lack of direct knowledge, the jury could reasonably have discounted or ignored Salomon's testimony.

In addition, defendant's own admission that he was in the tunnel during the attempted robbery and shooting might well have had a significant impact on the weight given to the testimony of these three witnesses.

## *2. No Identification Made From Photo Six-pack*

Defendant also claims that the victim's in-court identification of defendant is unreliable because the victim was unable to positively identify the defendant in an out-of-court photo six-pack shown to him after the crime. Even assuming, as defendant asserts, that an out-of-court identification is more reliable than an in-court identification, and while noting that the victim here did not make a positive out-of-court identification of defendant, still in this instance there was ample evidence presented which would allow the jury to determine that the in-court identification was reliable.

At the time the investigating detective put together the photo six-pack that included defendant, the victim had already described his assailant as a White male with tattoos on his neck and legs. To avoid prejudice, all six photos in the pack were cropped from the neck down to remove evidence of tattoos on any of them. Complicating matters, the detective was forced to use a somewhat out of date photograph of defendant because in more recent photographs defendant had a tattoo under one of his eyes, which could not be cropped out. Despite using the older, cropped photo, when shown the six-pack, the victim asked the detective "if it was a recent photo because he had tattoos," and "it seemed like an older picture" to him.



Even though the victim was not able to make a positive identification from the six-pack, his testimony concerning the six-pack coupled with his prior descriptions of the assailant could reasonably have led the jury to determine that the in-court identification of defendant was reliable. On appeal, it must be presumed that the jury did make this inference.

The arguments made by defendant are not persuasive enough to move this court to upset a properly rendered jury verdict.

## **II. APPLICABILITY OF SECTION 654**

Defendant contends that in the present case, punishment for both second-degree attempted robbery and assault with a firearm is barred by section 654 and that the trial court erred by not staying the sentence.

In relevant part, section 654 states: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

“Section 654 applies when there is a course of conduct which violates more than one statute but constitutes an indivisible transaction.” (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) Whether a course of conduct is indivisible depends on the intent and objective of the actor, which in turn is a factual matter to be determined by the fact finder. (*Ibid.*) Such a determination must be affirmed on appeal if it is supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.)

In the context of a robbery, injuries inflicted after completion of the robbery constitute divisible acts, so punishments for both the robbery and the subsequent injuries are not barred by section 654. The case of *In re Jesse F.* (1982) 137 Cal.App.3d 164 is illustrative. There, two assailants robbed a man of his watch and money, then took possession of his car. When the man attempted to flee, one of the assailants cut him

across the eye and hit him in the back of the head. (*Id.*, at p. 167.) The court held that “The fruits of the robbery were theirs and their escape was apparently assured. Their attempt to murder [the victim] as he fled constituted a separate act not necessary to effectuate the robbery.” (*Id.*, at p. 171.)

By contrast, acts committed incident to a robbery are not divisible. In *People v. Donohoe* (1962) 200 Cal.App.2d 17, 20, a man was robbed while he was a passenger in a car. The assailant in the back seat threw his arms around the victim’s neck and demanded his money. (*Ibid.*) The assailant then hit the victim over the head several times with a hard object. (*Ibid.*) The court stated that the assailant’s “objective was robbery and the force used was merely incidental to it.” (*Id.*, at p. 31.) As a result, the defendant in that case could only be punished for the more serious offense of robbery. (*Ibid.*)

By imposing sentence on both counts, the trial court here made an implicit finding there was a divisible course of conduct. We note that section 654 has at times been applied inconsistently by trial courts and by the Courts of Appeal, adding to the difficulty in applying it in any given case. But in the instant case, deference must be given to findings of fact made by the trial court.

The victim was held at gunpoint by defendant, who demanded the victim turn over all that he had. The victim, who only had \$20 on him, did not comply, but instead he attempted to flee. At that point, defendant pulled at the victim and shot the victim as the victim passed by. The evidence was close as to whether there was a divisible course of conduct. The assault did not take place at the outset of the crime. (See *People v. Flowers* (1982) 132 Cal.App.3d 584, 589 [defendant knocked victim unconscious at the beginning of the encounter, indicating a desire to silence the victim immediately so robbery could be completed with dispatch].) In the present case, the attempted robbery had been completed when defendant shot at the fleeing victim. Even though there is a reasonable inference defendant shot the victim so he could search the victim’s pockets and complete the robbery, there is an equally reasonable inference defendant was frustrated by the victim’s attempt to run from the scene. Hence, it is reasonable to infer defendant shot the

victim in anger -- a separate act of violence. (See *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1299-1300 [The defendant shot the victim when the victim refused to hand over money. The appellate court determined the facts supported the conclusion the attempted robbery was complete when the shot was fired so the subsequent assault was to punish the victim or assuage the defendant's thwarted desires by seeking other and different gratification.].) Thus, substantial evidence supports the court's implied finding of a divisible course of conduct.

### **DISPOSITION**

The judgment is affirmed.

**WOODS, J.**

**We concur:**

**PERLUSS, P. J.**

**JACKSON, J.**